Mallen v Masterwork, Inc.
2011 NY Slip Op 32293(U)
August 22, 2011
Nassau County
Docket Number: 9056/09
Judge: Denise L. Sher
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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ROBERT L. MALLEN,

Plaintiff,

- against -

MASTERWORK, INC. and GREGORY A. DEVITA,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 9056/09
Motion Seq. Nos.: 01, 02
Motion Dates: 04/06/11
04/27/11

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits and Memorandum of Law	1
Notice of Cross-Motion (Seq. No. 02) and Affidavit and Memorandum of Law	2
Affidavit in Opposition to Notice of Motion (Seq. No. 01)	3
Affirmation in Opposition to Cross-Motion (Seq. No. 02) and Reply Affirmation in Support of Notice of Motion (Seq. No. 01)	4
Reply Affirmation	5

Defendant Gregory A. DeVita ("DeVita") moves (Seq. No. 01), pursuant to CPLR § 3212, for an order granting summary judgment and dismissing the Amended Verified Complaint. Plaintiff opposes defendant DeVita's motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment and scheduling this matter for an Inquest on the issue of damages. Defendant DeVita opposes plaintiff's cross-motion. Defendant Masterwork, Inc. is no longer in the case.

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Plaintiff commenced this action to recover damages for personal injuries allegedly sustained while he was working at the premises located at 32 Sunview Drive, Glen Cove, New York ("the premises"). The premises is a one-family dwelling owned by defendant DeVita.

On May 2, 2008, at approximately 9:15 a.m., plaintiff allegedly "fell when he was crossing from one scaffold to another. Both scaffolds were attached to the garage" located at the premises. *See* Defendant DeVita's Affirmation in Support Exhibit C ¶ 3.

On the date of the accident, plaintiff, a carpenter, was working for defendant Masterwork, Inc. ("Masterwork"). Defendant DeVita had hired defendant Masterwork to perform renovation work on his garage which also housed a gym on the second floor. Defendant DeVita testified that he hired defendant Masterwork because Steve Szczesniak, the owner of defendant Masterwork, had been performing work for him at his home for at least fifteen to twenty years and he trusted him. *See* Defendant DeVita's Affirmation in Support Exhibit E pp. 4, 9-10.

On October 29, 2007, defendant DeVita wrote a letter to Mr. Baron, Building Department Administration of the Town of Glen Cove, wherein he indicated that he would "act as contractor for the construction of my garage, house and roof." Defendant DeVita further furnished "insurance information for [his] subs." *See* Defendant DeVita's Affirmation in Support Exhibit G.

In 2009, plaintiff commenced this action alleging violations of New York Labor Law §§ 200, 240 and 240(6). Thereafter, plaintiff served a Verified Bill of Particulars which alleged, *inter alia*, that defendants violated New York Labor Law §§ 240(1), 241(6) and 200. The Verified Bill of Particulars also claimed violations of New York State Industrial Code Sections

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23-1.7(b)(1), 23-5(j)(1) and (2), 23-5.3(e) and 23-5.13(d) and raised common-law negligence allegations against defendant DeVita.

The first two causes of action in the Verified Complaint were alleged against defendant Masterwork and the third and fourth causes of action were alleged against defendant DeVita. As previously stated, the action has been discontinued against defendant Masterwork.

Defendant DeVita moves for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241(6) claims on the grounds that there is no question of fact regarding defendant DeVita's entitlement to the single family homeowner exception to the Labor Law. As to plaintiff's Labor Law § 200 and common law negligence causes of action, defendant DeVita argues that he did not supervise, direct or control plaintiff's work. In support thereof, defendant DeVita relies upon plaintiff's Examination Before Trial ("EBT") testimony, his own EBT testimony and Steven Szczesniak's EBT testimony. *See* Defendant DeVita's Affirmation in Support Exhibits D, E and F.

Overall, defendant DeVita asserts that "the evidence unequivocally demonstrates that defendant Gregory DeVita did not supervise, direct or control plaintiff's work and is entitled to the single-family homeowner exception. Masterwork was hired by Dr. DeVita as the general contractor for the garage renovation project. Masterwork hired plaintiff and supervised plaintiff's work. Masterwork hired all the other contractors for the project and Masterwork selected and purchased all of the construction materials for the job. Dr. DeVita lived on the premises but did not inspect the work. When the work was completed, Dr. Devita was advised by the owner of Masterwork to come and look at it, which he did, and he was pleased with it. Dr. DeVita did have the typical homeowner involvement in that he had input on aesthetic

decisions and he purchased several ceiling fans for Masterwork to install in the garage/gym structure." *See* Defendant DeVita's Memorandum of Law.

Plaintiff opposes defendant DeVita's motion arguing that defendant DeVita represented to the City of Glen Cove that he was the contractor. Furthermore, the EBT tesrtimony of both defendant DeVita and Steven Szczesniak show that defendant DeVita exercised the requisite degree of control over the project. In particular, defendant DeVita acknowledged discussing the plans with the architect several times by phone or mail, where he admitted that he was not always happy with the architect's drawings and that they were changed to his satisfaction. *See* Defendant DeVita's Affirmation in Support Exhibit E pp. 6-8. Similarly, Steven Szczesniak stated that he always consulted defendant DeVita on how the project would proceed. *See* Defendant DeVita's Affirmation in Support Exhibit F p. 44. Not only did defendant DeVita and Steven Szczesniak meet several times before the project began, but they met once a week during the entire construction period. *See* Defendant DeVita's Affirmation in Support Exhibit E pp. 6-8. Similarly, Steven Szczesniak stated that he always consulted defendant DeVita on how the project would proceed. *See* Defendant DeVita's Affirmation in Support Exhibit F p. 44. Not only did defendant DeVita and Steven Szczesniak meet several times before the project began, but they met once a week during the entire construction period. During these meetings defendant DeVita and Steven Szczesniak discussed details of the job, cost for materials and payment of the sub-contractors. *See* Defendant DeVita's Affirmation in Support Exhibit F p.11; Plaintiff's Memorandum of Law. Defendant DeVita also supplied ceiling fans for the project and specifically told Steven Szczesniak where to install them. *See* Defendant DeVita's Affirmation in Support Exhibit E p. 30.

In *Henry v. Eleventh Avenue*, LP, __ N.Y.S.2d __, 2011 WL 3310373, the Appellate

Division, Second Department, observed as follows:

> "Labor Law § 240(1) imposes liability upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation-related hazards, where such failure is a proximate cause of the accident (*see Balzer v. City of New York*, 61 A.D.3d 796, 797, 877 N.Y.S.2d 435). Labor Law § 240(1) was specifically 'designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing fro the application of the force of gravity to an object or person' (*Ross v. Curtis-Palmer Hydro-Elec.* Co., 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82). Labor Law § 240(1) 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed' (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932 [internal quotation marks omitted]). To establish a *prima facie* violation of Labor Law § 240(1), a plaintiff must demonstrate that the defendants violated the statute and that the violation was the proximate cause of his or her injuries (*see Andro v. City of New York*, 62 A.D.3d 919, 880 N.Y.S.2d 111; *Reaber v. Connequot Cent. School Dist. No.* 7, 57 A.D.3d 640, 641, 870 N.Y.S.2d 72)."

Labor Law §§ 240(1) and 241(6) exempt from liability owners of one and two-family dwellings who contract for, but do not direct or control, the work. *See Bartoo v. Buell*, 87 N.Y.2d 362, 639 N.Y.S.2d 778 (1996); *Khela v. Neiger*, 85 N.Y.2d 333, 624 N.Y.S.2d 566 (1995). Labor Law § 240 provides in pertinent part as follows:

> "All contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work*, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor . . . devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." *See* Labor Law § 240(1) (emphasis added).

A similar homeowner's exemption is found in Labor Law § 241.

In order to vitiate the exception, the owner must exercise direction and control over the

particular aspect of the work from which the injury arose. *See Cannon v. Putnam*, 76 N.Y.2d 644, 563 N.Y.S.2d 16 (1990); *Van Alstine v. Padula*, 228 A.D.2d 909, 644 N.Y.S.2d 386 (1st Dept. 1996).

The exemption was enacted so that "the law would be fairer and more nearly reflect the practical realities governing the relationship between homeowners and the individuals they hired to perform construction work on their homes." *Affri v. Basch*, 13 N.Y.3d 592, 894 N.Y.S.2d 370 (2009) *quoting Cannon v. Putnam, supra,* at 649. Further, whether a defendant's conduct amounts to direction and control depends upon the degree of supervision exercised over "the manner and method of the work to be performed." *Id. quoting Duda v. Rouse Constr. Corp.*, 32 N.Y.2d 405, 345 N.Y.S.2d 524 (1973).

The phrase "direct or control" must be strictly construed and applies only where the owner "supervises the method and manner of the work," can order changes in the specifications, reviews the progress and details of the job with the general contractor and/or provides the equipment necessary to perform the work. *See Miller v. Shah*, 3 A.D.3d 521, 770 N.Y.S.2d 739 (2d Dept. 2004); *Garcia v. Petrakis*, 306 A.D.2d 315, 760 N.Y.S.2d 551 (2d Dept. 2003); *Duarte v. East Hills Construction Corp.*, 274 A.D.2d 493, 711 N.Y.S.2d 182 (2d Dept. 2000); *Valentin v. Thirty-Four Square Corp.*, 227 A.D.2d 467, 643 N.Y.S.2d 157 (2d Dept. 1996); *Kolakowski v. Feeney*, 204 A.D.2d 693, 612 N.Y.S.2d 243 (2d Dept. 1994).

Involvement by the owner with minor details, such as matters pertaining to decorating, is not enough to establish control. *See McGuiness v. Contemporary Interiors*, 205 A.D.2d 739, 613 N.Y.S.2d 697 (2d Dept. 1994); *Kelly v. Bruno & Son*, 190 A.D.2d 777, 593 N.Y.S.2d 555 (2d Dept. 1993); *Devodier v. Haas*, 173 A.D.2d 437, 570 N.Y.S.2d 63 (2d Dept. 1991).

It is undisputed that defendant DeVita submitted a letter to the Town of Glen Cove

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stating that he was the general contractor on the renovation project. The letter also indicated that the proof of insurance for the sub-contractors was enclosed therein. Defendant DeVita testified that he wrote this letter so that he could obtain the permit as defendant Masterwork did not have Nassau County license. "This avoided any fees involved with obtaining the permit as well as fees that otherwise would have been passed along to Dr. DeVita by Masterwork for Masterwork having to obtain a new Nassau County license." *See* Defendant DeVita's Affirmation in Support ¶11; Defendant DeVita's Affirmation in Support Exhibit E pp. 11, 31.

Considering defendant DeVita's involvement in the project and his letter to the City of Glen Cove, an issue of fact exists as to whether defendant DeVita is entitled to the single family homeowner exception to Labor Law §§ 240 and 241.

With respect to plaintiff's claim based upon § 200 of the Labor Law, it is well established that in order to impose liability upon the property owner, not only must it be shown by the plaintiff that the owner exercised supervisory direction and control over the operation that brought about the injury, but it must also be shown that the property owner had actual or constructive notice of the alleged unsafe condition that caused the accident. *See Maldonado v. Metropolitan Life Insurance Company,* 289 A.D.2d 176, 735 N.Y.S.2d 111 (1st Dept. 2001); *Nevins v. Essex Owners Corp.*, 276 A.D.2d 315, 714 N.Y.S.2d 38 (1st Dept. 2000); *Pisciotta v. St. John's Hospital*, 268 A.D.2d 465, 702 N.Y.S.2d 339 (2d Dept. 2000); *Dilena v. The Irving Reisman Irrevocable Trust*, 263 A.D.2d 375, 692 N.Y.S.2d 371 (1st Dept. 1999).

Furthermore, no liability will attach to an owner under the common-law or § 200 of the Labor Law where the defective or dangerous condition arises from a contractor or subcontractor's methods or negligent acts occurring as a detail of the work and the owner does not exercise any supervisory direction or control over the operation. *See Comes v. New York*

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State Electric & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168 (1993); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993); *Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55 (1992); *Richichi v. Construction Management Technologies*, 244 A.D.2d 540. 664 N.Y.S.2d 615 (2d Dept.1997).

As noted above, an issue of fact exists as to whether defendant DeVita exercised any supervision, direction or control over the operation. Hence, neither party is entitled to summary judgment on any of the causes of action alleged against defendant DeVita.

Accordingly, defendant DeVita's motion (Seq. No. 01), pursuant to CPLR § 3212, for an order granting him summary judgment dismissing the Amended Verified Complaint is hereby **DENIED**. Plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting him summary judgment on the issue of liability and setting this matter down for an inquest on the issue of damages is also hereby **DENIED**.

The remaining parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on August 23, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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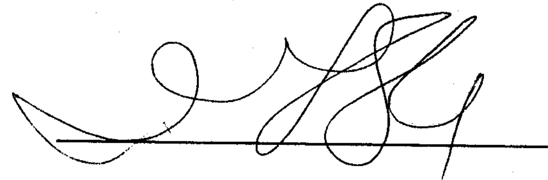

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 22, 2011

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AUG 23 2011
NASSAU COUNTY
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